

No. 455

Office - Supreme Court, U. S.

SEP 23 1940

United States Circuit Court of Appeals

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FOR THE SECOND CIRCUIT.

HENRY J. RIPPERGER, as Receiver of UNITED  
STATES ELECTRIC POWER CORPORATION,  
*Plaintiff-Appellant,*  
*vs.*

A. C. ALLYN & CO. INC., and FIRST BOSTON  
CORPORATION,  
*Defendants-Appellees,*

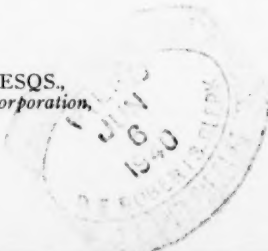
SCHRODER-ROCKEFELLER & CO. INC.,  
*Defendant.*

RECORD ON APPEAL.

JACOB K. JAVITS and  
PERCIVAL E. JACKSON, ESQS.,  
*Attorneys for Henry J. Ripperger,*  
*as Receiver of United States*  
*Electric Power Corporation,*  
*Plaintiff-Appellant,*  
*Office & P. O. Address,*  
*68 William Street,*  
*New York, N. Y.*

CLAIRE W. HARDY, ESQ.,  
*Attorney for A. C. Allyn & Co., Inc.,*  
*Defendant-Appellee,*  
*% L. E. Yeager,*  
*Room 1301,*  
*40 Wall Street,*  
*New York, N. Y.*

SULLIVAN & CROMWELL, ESQS.,  
*Attorneys for First Boston Corporation,*  
*Defendant-Appellee,*  
*48 Wall Street,*  
*New York, N. Y.*





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# United States District Court

SOUTHERN DISTRICT OF NEW YORK.

1

HENRY J. RIPPERGER, as Receiver of  
UNITED STATES ELECTRIC POWER COR-  
PORATION,

Plaintiff,

against

A. C. ALLYN & Co. INC., SCHRODER-  
ROCKEFELLER & Co. INC. and FIRST  
BOSTON CORPORATION,

Defendants.

Civil Action.  
File No.  
7-426.

2

## Agreed Statement Pursuant to Rule 76 of the Federal Rules of Civil Procedure.

Plaintiff has appealed from orders dismissing the complaint in this action as to defendants A. C. Allyn & Co. Inc., and First Boston Corporation upon the ground that this action was not brought within the proper venue for the reason that orders of this Court granting motions of those defendants to quash the service of subpoena and dismiss the complaint in a prior suit in this district between the plaintiff herein and said defendants upon the same causes of action, from which orders no appeal was taken by the plaintiff, are *res judicata* as to the right of the plaintiff to bring this suit within this district. Copies of the orders appealed from and the notices of appeal are printed *infra* at pages 5 to 10 and pages 25 to 27 respectively.

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On May 2, 1938, plaintiff, having been appointed Receiver of the United States Electric Power Corporation, a Maryland corporation, by the Circuit Court of Baltimore City, instituted an action in the United States District Court for the Southern District of New York as

4 *Agreed Statement Pursuant to Rule 76 of the Federal Rules of Civil Procedure.*

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Receiver of said Corporation against various directors, organizers and stockholders of the Corporation, and certain other persons. That action is numbered "E-87-20" and is presently scheduled to go to trial in September, 1940. The complaint in that action, No. E-87-20, set forth various transactions by which, pursuant to an alleged conspiracy, it is claimed the defendants used the assets of the Corporation to their individual profit and to the damage of the Corporation. The complaint in the present action, No. 7-426, contains identical allegations and is based on the same transactions.

The appellees herein, First Boston Corporation and A. C. Allyn & Co. Inc., were named as defendants in action No. E-87-20 and were served with subpoenas and copies of the bill of complaint. First Boston Corporation was and is a Massachusetts corporation and A. C. Allyn & Co. Inc. was and is a Delaware corporation. Both First Boston Corporation and A. C. Allyn & Co. Inc. have designated the Secretary of State of New York as their agent upon whom process may be served, and have been authorized to do business in New York. Such designations were made and authorization secured long prior to the institution by the plaintiff of action No. E-87-20, and have been continuously and still are in effect.

Defendants First Boston Corporation and A. C. Allyn & Co. Inc. duly moved in said action, No. E-87-20, for orders vacating and setting aside the attempted service of subpoenas and complaints upon them and dismissing the complaint as to them upon the ground that the jurisdictional basis of the suit was alleged to be diversity of citizenship and that neither plaintiff nor either of said defendants were inhabitants or residents of the State of New York or of the Southern District of New York. Both motions were unopposed by plaintiff and on June 8, 1938,

*Agreed Statement Pursuant to Rule 76 of the Federal Rules of Civil Procedure.* 7

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and June 13, 1938, orders were entered in said action, No. E-87-20, vacating the service of the subpoenas and complaints and dismissing the complaints as to defendants A. C. Allyn & Co. Inc. and First Boston Corporation respectively. The plaintiff did not appeal from the said orders.

Thereafter, plaintiff instituted similar actions based upon the same transactions against First Boston Corporation and A. C. Allyn & Co. Inc. in the United States District Courts of Massachusetts and Delaware respectively, in both of which actions additional defendants are named. Preliminary motions have been made in the said actions, answers have been served and the cases are at issue and pending trial. 8

Following the decision of the Supreme Court of the United States in the case of *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, on November 22, 1939, plaintiff instituted the present action in the United States District Court for the Southern District of New York against First Boston Corporation and A. C. Allyn & Co. Inc., alleging that the said defendants have appointed agents within the State of New York for the receipt of process, and joining as an additional defendant, Schroder-Rockefeller & Co. Inc., a corporation which had not previously been sued. In all other respects, the complaint in the present action, No. Civ.-7-426, is similar to the complaint in the original action, No. E-87-20, presently pending in the District Court for the Southern District of New York and the transactions set forth are the same. 9

Appellees, First Boston Corporation and A. C. Allyn & Co. Inc., by notices of motion dated April 9, and April 5, 1940, respectively, moved for orders

(1) quashing, vacating and setting aside the attempted service of the summons and complaint and

10 *Agreed Statement Pursuant to Rule 76 of the Federal  
Rules of Civil Procedure.*

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11 dismissing the complaint as to each of said defend-  
ants upon the ground that the action had not been  
brought within the proper venue for the reason that  
the causes of action set forth in plaintiff's complaint  
are the same causes of action set forth in the com-  
plaint filed in the said action of the plaintiff against  
the said defendants (No. E-87-20) in this Court and  
that the final orders of this Court in said action No.  
E-87-20 in dismissing said complaint and vacating,  
setting aside and declaring null and void the at-  
tempted service of subpoena against said defendants  
not having been appealed by the plaintiff are *res judi-*  
*cata* as to the attempted service of summons upon the  
said defendants herein; and further

12 (2) dismissing the complaint as to each of said  
defendants upon the ground that jurisdiction of the  
subject matter of the present action as against said  
defendants had been assumed by the Federal District  
Courts for the Districts of Massachusetts and Dela-  
ware respectively and that the District Court for the  
Southern District of New York should accordingly  
decline jurisdiction of this action.

The said motions were made upon affidavits of John C. Bruton, Jr., Esq., and Claire W. Hardy, Esq., printed *infra* at pages 11 to 18, the orders above referred to in said action No. E-87-20, printed *infra* at pages 23 and 24, the subpoena and complaint in said action No. E-87-20 and the accompanying exhibits referred to in said notices of motion and affidavits. Defendant Schroder-Rockefeller & Co. Inc. also moved to dismiss the complaint on the ground that it failed to state a claim against said defendant upon which relief can be granted. The affidavit



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*Orders Appealed From.*

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of Percival E. Jackson, Esq., was submitted in opposition to said motion (printed *infra* at pages 19 to 22).

The motions were opposed by the plaintiff and oral argument was had thereon before Honorable Henry W. Goddard, U. S. D. J. In an opinion dated May 1, 1940, printed *infra* at page 27, Judge Goddard granted the motions of defendants First Boston Corporation and A. C. Allyn & Co. Inc., and thereafter on May 9, 1940 orders, printed *infra* at pages 5 to 10, were signed and entered from which plaintiff has appealed. The motion to dismiss made by defendant Schroder-Rockefeller & Co. Inc. was also granted with leave to file an amended complaint and an order entered thereon on May 9, 1940.

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**Point to be Relied on by the Appellant.**

That the Court erred in holding that the prior dismissals on the ground of improper venue in the action numbered "E-87-20" required a dismissal of the present action as to defendants First Boston Corporation and A. C. Allyn & Co., Inc., upon the principle of *res judicata*.

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**Orders Appealed From.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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Defendant, A. C. Allyn & Co. Inc., appearing specially and solely for the purpose of this motion, having moved this Court by notice of motion, dated April 5, 1940, for an order vacating, quashing and setting aside the attempted

- service of the summons and complaint herein on the said defendant and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the action has not been brought within the proper venue for the reason that the causes of action set forth in plaintiff's complaint herein are similar to the causes of action set forth in a prior suit instituted by the plaintiff herein against said defendant in this court, which suit bears the designation of Action No. E87-20 and the order of this Court in dismissing the complaint and vacating, setting aside and declaring null and void the service of the subpoena therein upon said defendant upon the ground that said suit was not brought within the proper venue is binding upon the plaintiff herein in the present cause of action as a prior judgment of this court between the plaintiff herein and said defendant upon the same or similar causes of action, and further having moved for an order dismissing plaintiff's complaint as to the "First," "Third" and "Fourth" causes of action therein, as to said defendant upon the ground that jurisdiction of the subject matter of the causes of action set forth in the complaint herein as against said defendant has been assumed by the United States District Court for the District of Delaware in an action pending therein and that this Court should accordingly decline jurisdiction of this action, and said motion having regularly come to be heard,

Now upon reading and filing said notice of motion, dated April 5, 1940, the summons and complaint herein, the subpoena and complaint in an action now pending in this Court, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against Arthur C. Allyn, *et al.*, Defendants, No. E87-20", the affidavit of Claire W. Hardy, Esq., sworn to the 3rd day of April, 1940, with proof of due service thereof, the

exhibits attached to said affidavit including the final order entered in this court on June 8, 1938, in said action No. E. 87-20, dismissing the complaint therein as to the Defendant, A. C. Allyn & Co. Inc., the summons and complaint in an action in the United States District Court for the District of Delaware, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, vs. A. C. Allyn & Co. Inc., *et al.*, Defendant No. 14", the affidavit of Percival E. Jackson, Esq., sworn to on the 15th day of April, 1940, with proof of due service thereof and the reply affidavit of Claire W. Hardy, Esq., sworn to on the 16th day of April, 1940, with proof of due service thereof, and after hearing Claire W. Hardy, Esq., attorney for said defendant in support of said motion and Percival E. Jackson, Esq., attorney for plaintiff herein in opposition thereof, and due deliberation having been had, it is

ORDERED that the said motion for an order vacating and setting aside the attempted service of the summons and complaint herein on the defendant, A. C. Allyn & Co. Inc., and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the action has not been brought within the proper venue for the reason that the causes of action set forth in plaintiff's complaint herein are similar to the causes of action set forth in a prior suit instituted by the plaintiff herein against said defendant in this court, which suit bears the designation of Action No. E87-20 and the order of this Court in dismissing the complaint and vacating, setting aside and declaring null and void the service of the subpoena therein upon said defendant upon the ground that said suit was not brought within the proper venue is binding upon the plaintiff herein in the present cause of action as a prior judgment of this court be-

tween the plaintiff herein and said defendant upon the same or similar causes of action.

ORDERED that the complaint be and the same hereby is dismissed as to defendant, A. C. Allyn & Co., Inc., and the attempted service of the summons and complaint herein on the defendant, A. C. Allyn & Co., Inc. be and the same hereby is vacated, set aside and declared null and void.

Dated, New York, May 9th, 1940.

HENRY W. GODDARD,  
U. S. D. J.

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DISTRICT COURT OF THE UNITED STATES,  
SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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Defendant, First Boston Corporation, appearing specially and solely for the purpose of this motion, having moved this Court by notice of motion, dated April 9, 1940, for an order vacating and setting aside the attempted service of the summons and complaint herein on the said defendant and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the jurisdiction of this Court is invoked solely on the ground of the diversity of citizenship and neither the plaintiff nor the defendant, First Boston Corporation, is an inhabitant or resident of the State of New York or of the Southern District of New York, and that it has been conclusively determined between the parties to this action by an order of this Court, dated June 13,

1938, that said defendant, First Boston Corporation, was not and is not subject to suit in the Southern District of New York upon the causes of action set forth in this complaint, and, further, for an order dismissing the complaint as to said defendant upon the ground that jurisdiction of the subject matter of the causes of action set forth in the complaint herein as against said defendant has been assumed by the United States District Court for the District of Massachusetts in an action pending therein bearing No. 462, and that this Court should accordingly decline jurisdiction of this action, and for such other and further relief as may be proper, and said motion having regularly come on to be heard,

Now, upon reading and filing said notice of motion dated April 9, 1940, the summons and complaint herein, the subpoena and complaint in an action now pending in this Court entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against Arthur C. Allyn, *et al.*, Defendants, No. E87-20", the affidavit of John C. Bruton, Jr., Esq., sworn to the 9th day of April, 1940, with proof of due service thereof, the exhibits attached to the said affidavit, including the final order entered in this Court on June 13, 1938, in said action No. E87-20, dismissing the complaint therein as to defendant, First Boston Corporation, the complaint in an action in the United States District Court for the District of Massachusetts entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against John R. Macomber, Charles D. Makepeace and The First Boston Corporation, Defendants, No. 462" and the motion to amend the said complaint in the said action No. 462, the affidavit of Percival E. Jackson, Esq., sworn to on the 15th day of April, 1940, with proof of due service thereof, the reply affidavit of John C. Bruton, Jr., Esq., sworn to on the 17th day of April,

1940, and the exhibits attached thereto, with proof of due service thereof, and after hearing John C. Bruton, Jr., Esq., of counsel for said defendant, in support of said motion and Percival E. Jackson, Esq., attorney for the plaintiff herein, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the Court, it is

29 ORDERED that the said motion for an order vacating and setting aside the attempted service of the summons and complaint herein on the defendant, First Boston Corporation, and dismissing the complaint herein insofar as the same relates to the said defendant upon the ground that the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship, and neither the plaintiff nor said defendant is an inhabitant or resident of the State of New York or of the Southern District of New York and that it has been conclusively determined between the parties to this action by an order of this Court, dated June 13, 1938, that said defendant, First Boston Corporation, was not and is not subject to suit in the Southern District of New York upon the causes of  
30 action set forth in this complaint, be and the same hereby is granted; and it is further

ORDERED that the complaint be and the same hereby is dismissed as to defendant, First Boston Corporation, and the attempted service of the summons and complaint herein on the defendant, First Boston Corporation, be and the same hereby is vacated, set aside and declared null and void.

Dated, New York, May 9th, 1940.

HENRY W. GODDARD,  
U. S. D. J.

Affidavit of Claire W. Hardy, Esq.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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State of Illinois, }  
 County of Cook, } ss.:

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CLAIRE W. HARDY, being duly sworn, deposes and says that he is a resident of the City of Evanston, County of Cook and State of Illinois, and is duly admitted to the practice of law before the courts of the States of New York and Illinois.

That he was retained by A. C. Allyn and Company, Inc., as one of its counsel in defending a certain cause of action in the United States District Court, for the Southern District of New York, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff vs. Arthur C. Allyn, et al., Defendants, No. E. 87-20," and is familiar with the complaint and other pleadings filed in said action. That subpoena and complaint therein were served upon said A. C. Allyn and Company, Inc., on or about May 2, 1938. That on the 24th day of May, 1938, judgment was entered in said action dismissing the complaint therein and vacating, setting aside and declaring null and void the attempted service of the subpoena and complaint therein on the said defendant, A. C. Allyn and Company, Inc., upon the motion of Messrs. Seibert & Riggs, of New York City, in behalf of said defendant. That said motion was made upon the ground that, as shown by the complaint therein, said defendant had been incorporated under the laws of

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the State of Delaware and was not within the jurisdiction of the United States District Court for the Southern District of New York for the purposes of said suit. That the plaintiff in said action abided by said judgment and no appeal was taken therefrom.

35 Deponent further says that thereafter he was retained by A. C. Allyn and Company, Inc., as one of its counsel in defending a certain cause of action now pending in the United States District Court for the District of Delaware, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff vs. A. C. Allyn & Co., Inc., *et al.*, Defendants, Civil Action File No. 14." That the summons and complaint in said suit were served upon said defendant, A. C. Allyn and Company, Inc., on or about November 3, 1938. That deponent is familiar with the complaint and other pleadings in said action; that an answer to said complaint has been filed in behalf of said defendant, A. C. Allyn and Company, Inc., by deponent and Howard Duane, Esq., of Wilmington, Delaware, as attorneys for said defendant, and said action is now at issue and pending trial in said United States District Court for the District of Delaware.

36 Deponent further says that thereafter he was retained by A. C. Allyn and Company, Inc., as its attorney in defending a certain cause of action now pending in the United States District Court for the Southern District of New York, entitled "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff vs. Arthur C. Allyn, *et al.*, Defendants, Civil Action No. 7-426," and that he is familiar with the complaint which has been filed in said proceeding. That summons and complaint were served upon said defendant, A. C. Allyn and Company, Inc., on or about February 29, 1940.

That the complaint filed in the United States District Court in said suit No. E. 87-20 comprises four alleged



causes of action; that the complaint filed in the suit in the United States District Court for the District of Delaware in Civil Action File No. 14 comprises three alleged causes of action; that the complaint filed in the United States District Court for the Southern District of New York in Civil Action No. 7-426 comprises four alleged causes of action.

That the alleged causes of action set forth in the complaint filed in the said suit in the United States District Court for the District of Delaware numbered "First," "Second" and "Third" are the same causes of action as those numbered "First," "Third" and "Fourth" in the complaint filed in the suit in the United States District Court for the Southern District of New York numbered E. 87-20, and the last paragraph in each such alleged cause of action in the said suit in the District of Delaware contains the following allegation:

"That plaintiff herein on or about the 28th day of April, 1938, instituted an action in the United States District Court for the Southern District of New York against the security dealers, their associates and the directors of U. S. Electric Power Corporation, including the defendants A. C. Allyn & Co., Inc., and American General Corporation claiming damages and other relief by reason of the facts set forth herein; that said action was dismissed on consent by the plaintiff as to the present defendants upon their motion to dismiss as to them since they were not citizens of the State of New York; that for that reason this action was brought against these defendants in this Court and the other security dealers, their associates and the directors are not joined since they are presently parties defendant in said suit pending in the Southern District of New York, or are not subject to the jurisdiction of this Court."

That the causes of action numbered "First," "Third" and "Fourth" in the suit now pending in the United States District Court for the Southern District of New York, No. 7-426, contain the same allegations of fact and are the same causes of action set forth in the complaint in said suit No. 14 now pending in the United States District Court for the District of Delaware. That said causes of action numbered "First," "Third" and "Fourth" in the complaint in the said suit No. 7-426 in the United States District Court for the Southern District of New York are already pending and at issue before a Court of competent jurisdiction, to-wit, the United States District Court for the District of Delaware, of which District the said defendant, A. C. Allyn and Company, Inc., is a resident, and have been so pending for upward of fifteen months prior to the institution of said suit No. 7-426 in the United States District Court for the Southern District of New York.

That the four causes of action set forth in the complaint in the suit now pending in the United States District Court for the Southern District of New York, No. 7-426, contain the same allegations of fact and are the same causes of action set forth in the complaint filed in the suit now pending in the United States District Court for the Southern District of New York, No. E. 87-20, the complaint in which was dismissed and the service of the subpoena therein upon the said defendant, A. C. Allyn and Company, Inc., by judgment of the United States District Court for said District, duly entered, was vacated, set aside and declared null and void. That the said plaintiff abided said judgment and no appeal was taken therefrom by said plaintiff, and the same stands as the judgment of this Court as to any litigation in said District between the said plaintiff and the said defendant, A. C. Allyn and Company, Inc., upon any of the al-

*Affidavit of John C. Bruton, Jr., Esq.*

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leged causes of action set forth in the complaint in said suit No. E. 87-20.

CLAIRE W. HARDY.

Subscribed and sworn to before me this  
3rd day of April, 1940.

ELLEN K. LUNDBY,  
Notary Public.

44

**Affidavit of John C. Bruton, Jr., Esq.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

State of New York, }  
County of New York, } ss.:

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JOHN C. BRUTON, JR., being duly sworn, deposes and says: I am an attorney at law and a member of the bar of this Court. I am associated with the firm of Sullivan & Cromwell, attorneys for defendant, First Boston Corporation, and am in charge of this action on behalf of the said defendant.

The firm of Sullivan & Cromwell also represented defendant, First Boston Corporation, in another action now pending in this Court entitled, "Henry J. Ripperger, as Receiver of United States Electric Power Corporation,

Plaintiff, against Arthur C. Allyn, *et al.*, Defendants, No. E87-20", and I also was personally in charge of the defense of defendant, First Boston Corporation, in that action. Reference is hereby specifically made to the subpoena and complaint in the said action, and they will be requisitioned from the files of this Court for use on this motion.

47 As appears from the subpoena and complaint in the said action, No. E87-20, defendant, First Boston Corporation, was named as a defendant in that action. A comparison of the complaint in that action, No. E87-20, with the complaint in this present action, No. 7-426, reveals that the same alleged four causes of action are set forth in each complaint, and that the material allegations of each complaint are identical. The only change is the addition of Schroder-Rockefeller & Co. Inc., as a defendant in the present action, No. 7-426; the causes of action alleged are identical.

48 As appears from the files of this Court, defendant, First Boston Corporation, appearing specially through Sullivan & Cromwell as its attorneys, moved in said action, No. E87-20, by notice of motion dated May 16, 1938, for an order vacating and setting aside the attempted service of subpoena and complaint upon it and dismissing the bill of complaint as to it, upon the ground that the jurisdictional basis of the suit was alleged to be diversity of citizenship and that "neither the plaintiff nor the defendant, First Boston Corporation, are inhabitants or residents of the State of New York or of the Southern District of New York." The said motion was supported by an affidavit of Nevil Ford, a Vice-President of defendant, First Boston Corporation, setting forth the fact that defendant, First Boston Corporation, is a corporation organized and existing under the laws of the State of Massachusetts, and is not and never has been a

citizen, resident or inhabitant of the State of New York or of the Southern District of New York. The motion of defendant, First Boston Corporation, was granted by an order of this Court dated June 13, 1938. For the convenience of the Court, a copy of the said order is annexed hereto marked Exhibit A.

The plaintiff herein, who is also the plaintiff in said action, No. E87-20, took no appeal from the said order dated June 13, 1938, and acquiesced therein. Thereafter, in or about November, 1939, plaintiff commenced an action in the United States District Court for the District of Massachusetts entitled, "Henry J. Ripperger, as Receiver of United States Electric Power Corporation, Plaintiff, against John R. Macomber, Charles D. Makepeace and The First Boston Corporation, Defendants, No. 462," and, upon information and belief, the summons and complaint in said action, No. 462, were served upon defendant, First Boston Corporation. A copy of the complaint in the said action in the United States District Court for the District of Massachusetts, No. 462, is annexed hereto as Exhibit B. Thereafter plaintiff in said action in the United States District Court for the District of Massachusetts, No. 462, made a motion to amend the complaint. A copy of the said motion is annexed hereto and marked Exhibit C. The effect of the said motion is to amend the complaint by correcting certain clerical errors in the preparation of the complaint so that the complaint now sets forth three causes of action.

A comparison of the complaint, as amended, in the said action in the United States District Court for the District of Massachusetts, No. 462, with the complaint in the present action in this district, No. 7-426, indicates that the three causes of action set forth in the Massachusetts action are identical with the first three causes of action set forth in the present action. It further appears from

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*Affidavit of John C. Bruton, Jr., Esq.*

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an examination of the complaint in the present action in this District, No. 7-426, that defendant, First Boston Corporation, is not charged with having participated in any of the acts set forth in the fourth cause of action in the present complaint. The suit pending against defendant, First Boston Corporation, in the United States District Court for the District of Massachusetts is therefore in effect identical with the present action. I am informed by the counsel for defendant, First Boston Corporation, who represent it in the suit in the United States District Court for the District of Massachusetts, that defendant, First Boston Corporation, has moved in that action for a more definite statement and a bill of particulars, and that the plaintiff has furnished an answer to the said motion of defendant, First Boston Corporation, in that action. I am further informed that defendant, First Boston Corporation, has filed its answer in the action in the United States District Court for the District of Massachusetts and that the said action is now pending and at issue.

54

In view of the facts set forth in this affidavit, I respectfully request, on behalf of defendant, First Boston Corporation, that relief be granted as prayed for in the annexed notice of motion.

JOHN C. BRUTON, JR.

Sworn to before me this  
9th day of April, 1940.

JOHN W. P. SLOBADIN,  
Notary Public, New York County.

(Notarial Seal)

**Affidavit of Percival E. Jackson, Esq.**

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**DISTRICT COURT OF THE UNITED STATES,  
SOUTHERN DISTRICT OF NEW YORK.**

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[SAME TITLE]

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State of New York,     }  
City of New York,       }ss.:  
County of New York,    }

PERCIVAL E. JACKSON, being duly sworn, deposes and says:

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That this affidavit is made in opposition to identical motions made by defendants, First Boston Corporation and A. C. Allyn & Co. Inc. for orders vacating and setting aside the service of a summons on each of them and for an order dismissing the complaint as to each of them.

I am one of counsel for the plaintiff receiver in another action in this Court entitled Henry J. Ripperger, as Receiver of United States Electric Power Corporation v. Arthur C. Allyn, *et al.*, defendants, No. E-87-20. That action was instituted by the Receiver of United States Electric Power Corporation against various directors, organizers and principal stockholders of the corporation charging them with a conspiracy to use the assets of the corporation for their private aims as a result of which the defendants profited, the assets of the corporation were depleted, and it went into insolvency.

57

This action was instituted in this Court for the reason that most of the defendants were residents and citizens of the State of New York. Among the defendants named in that action were the moving parties in this action, A. C. Allyn & Co. Inc. and First Boston Corporation. We knew, as the complaint in that action alleged (Par. Second, subdivisions [1] and [p]) that A. C. Allyn & Co.

Inc. was a Delaware corporation and First Boston Corporation was a Massachusetts corporation and that by reason of that fact, both of these defendants could object to the venue of this Court. However, the defendants could consent to be sued in this District, in which event the jurisdiction of this Court would be unquestioned. If they did not consent to appear, it would be necessary to start actions against them elsewhere. Nevertheless, since they were proper parties to the action involving the charges made therein and it seemed in the interests of all

59 that the issues raised be disposed of in one suit, these defendants were joined.

As appears from the moving papers, each of these defendants moved for an order vacating and setting aside the service of a subpoena upon them and for an order dismissing the bill of complaint upon the ground that neither the plaintiff nor the defendant were inhabitants or residents of the State of New York or of the Southern District of New York. These motions were unopposed and the Court entered orders vacating the service of the subpoenas and dismissing the complaint as to them.

60 Thereafter, similar actions were instituted by the receiver against each of these defendants in the State of their incorporation.

Thereafter and on November 22, 1939, the Supreme Court of the United States in the case of *Neirbo Co. vs. Bethlehem Shipbuilding Corp.*, 84 L. Ed. 123, in reversing a decision by the Circuit Court of Appeals of this Circuit, held that a foreign corporation which had filed a certificate of doing business with the Secretary of State and had designated an agent within the State for the receipt of process, by reason of such designation had consented to being sued in the Federal Courts of that State and having so consented, could not object to the venue of the Court.

Investigation disclosed that both First Boston Cor-



poration and A. C. Allyn & Co. Inc. had designated agents within the State to receive process, and therefore a new action was instituted in this Court against these defendants and Schroder-Rockefeller & Co. Inc., a corporation which had not previously been sued, predicated on the same issues that are raised in the principal suit pending in this Court and in the suits brought in the States of incorporation of A. C. Allyn & Co. Inc. and First Boston Corporation.

The defendants now move for an order vacating the service of the summons and dismissing the complaints as to them, first, on the basis of the prior ruling dismissing the prior complaints in the action entitled Henry J. Ripperger v. Arthur C. Allyn, *et al.*, and, secondly, on the ground that another action is pending against these defendants in other Federal Courts for the same relief sued herein.

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The legal issues raised by this motion are discussed in a memorandum of law that will be submitted in opposition to this motion, and need not be elaborated here.

We should point out, however, that it was our aim in instituting the present action, to make possible a disposition of the issues raised against all of the defendants in a single trial and avoid the delay and expense, to litigants and to the Courts, involved in trying this cause first in this Court, it will be tried this September, and thereafter retrying the action in Delaware and then in Massachusetts. We intend, if this motion is denied, to consolidate the instant action with the principal case and to discontinue the actions pending in Massachusetts and in Delaware. Of course, there will be no element of harassing these defendants by prosecuting suits in two courts. On the contrary, it should be to their interest, as it is to the interest of the Court, that this course of procedure be adopted, for then the whole matter will be disposed of at one time.

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65 Lastly, there is a factual difference between the present complaint and the prior one in the action pending in this Court. The present complaint alleges (Par. Second, subd. [a] and subd. [c]) that the defendant, A. C. Allyn & Co., Inc., and the defendant, First Boston Corporation, each appointed an agent within the State of New York for the receipt of process. The prior complaint contained no such allegation and it is the fact of such designation that, under the decision of the Supreme Court, permits this suit to be brought in this Court. Had the defendants not consented to be sued here by such designation, they could have objected, as they previously did, on the grounds of improper venue.

The defendant Schroder-Rockefeller & Co. Inc. also moves to dismiss on the ground that the complaint fails to state a cause of action as to it, and for certain other relief.

66 As will appear from the memorandum submitted herewith, the defendant, Bancamerica Blair Corp., in the action entitled Ripperger v. Allyn, made an identical motion based upon the same facts alleged as to that corporation that are now alleged as to Schroder-Rockefeller & Co. Inc. and Judge Patterson held that the complaint stated a cause of action and denied the motion. Judge Leibell, following the decision of Judge Patterson, denied similar motions made by other defendants.

It is respectfully submitted that the three motions to dismiss be denied.

PERCIVAL E. JACKSON.

Sworn to before me this  
15th day of April, 1940.

ROGER E. SEIDEL,  
Notary Public.

Orders in Prior Action, No. E 87-20.

67

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY J. RIPPERGER, as Receiver of  
UNITED STATES ELECTRIC POWER COR-  
PORATION,

Plaintiff,

E 87-20.

against

ARTHUR C. ALLYN, *et al.*,

Defendants.

68

Defendant, A. C. Allyn & Co., Inc., appearing specially, having moved this Court by notice of motion dated May 16, 1938, for an order dismissing the complaint and vacating, setting aside and declaring null and void the attempted service of the subpoena and complaint herein on said defendant, and said motion having regularly come on to be heard, and upon reading and filing the said notice of motion and the affidavit of L. E. Yeager, verified May 16, 1938, with proof of due service thereof, and after hearing H. Preston Coursen, of counsel for said defendant in support of said motion, and no one appearing in opposition, and due deliberation having been had, Now, and on motion of Seibert & Riggs, attorneys for said defendant, appearing specially and solely for the purpose of this motion, it is

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ORDERED, that the said motion be and the same is hereby granted, and it is further

ORDERED, that the complaint be and the same is hereby dismissed as to defendant, A. C. ALLYN & Co., INC., and the attempted service of the subpoena and complaint herein on said defendant, A. C. Allyn & Co., Inc., be and the same is hereby vacated, set aside and declared null and void.

Dated, New York, June 8th, 1938.

ROBERT P. PATTERSON,  
U. S. District Judge.

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*Orders in Prior Action, No. E 87-20.*

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

HENRY J. RIPPERGER, as Receiver of  
UNITED STATES ELECTRIC POWER COR-  
PORATION,

Plaintiff,

against

ARTHUR C. ALLYN, *et al.*,

Defendants.

} E 87-20.

71

Defendant, First Boston Corporation, appearing specially and solely for the purpose of this motion, having moved this Court by notice of motion dated May 16, 1938, for an order vacating and setting aside the attempted service of the subpoena and complaint herein on the defendant First Boston Corporation, and dismissing the bill of complaint herein in so far as the same relates to said defendant, and said motion having regularly come on to be heard, and upon reading and filing the said notice of motion and the affidavit of Nevil Ford, sworn to the 16th day of May, 1938, with proof of due service thereof, and after hearing John C. Bruton, Jr., Esq., of counsel for said defendant in support of said motion, and no one appearing in opposition thereto, and due deliberation having been had, Now, on motion of Sullivan & Cromwell, attorneys for said defendant, appearing specially and solely for the purpose of this motion, it is

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ORDERED, that the said motion be and the same is hereby granted, and it is further

ORDERED, that the complaint be and the same is hereby dismissed as to defendant, First Boston Corporation, and the attempted service of the subpoena and complaint herein on the defendant, First Boston Corporation, be and the same is hereby vacated, set aside and declared null and void, without costs.

Dated, New York, June 13th, 1938.

ROBERT P. PATTERSON,  
United States District Judge.

# Notices of Appeal.

73

## DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

HENRY J. RIPPERGER, as Receiver of  
UNITED STATES ELECTRIC POWER COR-  
PORATION,

Plaintiff,

against

A. C. ALLYN & CO. INC., SCHRODER-  
ROCKEFELLER & CO. INC. and FIRST  
BOSTON CORPORATION,

Defendants.

Civil Action.

File No.

7-426.

74

SIRS:

PLEASE TAKE NOTICE that HENRY J. RIPPERGER, as Re-  
ceiver of United States Electric Power Corporation, the  
plaintiff herein, hereby appeals to the United States  
Circuit Court of Appeals for the Second Circuit, from  
an order made and entered in the above entitled action  
on the 9th day of May, 1940, by Hon. Henry W. Goddard,  
dismissing, vacating and setting aside service of the  
summons and complant herein on the defendant A. C. 75  
Allyn & Co., Inc., and dismissing the complaint as to  
said defendant.

Dated, New York, May 27, 1940.

Yours, etc.,

JACOB K. JAVITS and  
PERCIVAL E. JACKSON,  
Attorneys for Plaintiff,  
68 William Street,  
Borough of Manhattan,  
City of New York.

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*Notices of Appeal.*

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To:

The Honorable Clerk of the  
 United States District Court  
 For the Southern District of New York,

CLAIRE W. HARDY, Esq.,  
 Attorney for Defendant  
 A. C. Allyn & Co., Inc.,  
 % Leland E. Yeager,  
 Room 1301,  
 40 Wall Street,  
 New York City.

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DISTRICT COURT OF THE UNITED STATES,  
 SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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78

SIRS:

PLEASE TAKE NOTICE that HENRY J. RIPPERGER, as Receiver of United States Electric Power Corporation, the plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order made and entered in the above entitled action on the 9th day of May, 1940, by Hon. Henry W. Goddard, dismissing, vacating and setting aside service of the summons and complaint herein on the defendant First

Boston Corporation and dismissing the complaint as to said defendant.

Dated, New York, May 27, 1940.

Yours, etc.,

JACOB K. JAVITS and  
PERCIVAL E. JACKSON,  
Attorneys for Plaintiff,  
68 William Street, 80  
Borough of Manhattan,  
City of New York.

To:

The Honorable Clerk of the  
United States District Court  
For the Southern District of New York,

SULLIVAN & CROMWELL, ESQs.,  
Attorneys for Defendant  
First Boston Corporation,  
48 Wall Street,  
New York City. 81

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Opinion of Hon. Henry W. Goddard, U. S. D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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83

JACOB K. JAVITS and  
PERCIVAL E. JACKSON,  
Attorneys for Plaintiff.

CLAIRE W. HARDY,  
Attorney for Defendant,  
A. C. Allyn & Co. Inc.

SULLIVAN & CROMWELL,  
Attorneys for Defendant,  
Schroder-Rockefeller & Co. Inc.  
By John C. Bruton, Jr.

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SULLIVAN & CROMWELL,  
Attorneys for Defendant,  
First Boston Corporation,  
By John C. Bruton, Jr.

GODDARD, District Judge:

(I) Defendants, A. C. Allyn & Co. Inc., and First Boston Corporation have made motions to dismiss the complaint as against them on two grounds:

(a) That a prior order dismissing similar complaints against them on the ground of improper venue is *res judicata*; (b) that similar actions by the plaintiff are



pending in the United States District Courts for the Districts of Delaware and Massachusetts, and that this court should accordingly decline jurisdiction of this action.

Plaintiff is a receiver appointed by the Circuit Court of Baltimore City and is a resident and citizen of the State of Maryland. The moving defendants are incorporated in the States of Delaware and Massachusetts respectively. They were originally named as defendants in action No. E 87-20 which is still pending in this district as to the other defendants and which, it is anticipated, will be reached for trial this coming Autumn. But by final order dated June 13, 1938 action No. E 87-20 was dismissed as to defendant, First Boston Corporation, and by order dated June 8, 1938 it was dismissed as to defendant, A. C. Allyn & Co. Inc. on the grounds that under the provisions of section 51 of the Judicial Code (28 U. S. C. sec. 112) the venue was improper as to them. 86

Plaintiff took no appeal from these orders but after the decision of the Supreme Court in the case of *Neirbo Co. v. Bethlehem Ship Building Corp.*—308 U. S. 165, he began this action. It appears that prior to the inception of action No. E 87-20 and at all times since, both moving defendants have had on file a certificate of doing business in the state and have designated an agent within this state for receipt of process. 87

The orders of June 13, 1938 and of June 8, 1938 respectively in the prior suit are *res judicata* as to the right of plaintiff to bring suit against the moving defendants in this district upon the cause of action set forth in the first complaint and re-alleged in this complaint. No new material facts are alleged in the complaint in the second suit. This court decided that it did not have jurisdiction and a judgment to that effect was entered. No appeal was taken so that judgment still stands. It

was a judicial determination by the court upon questions of fact and law, which it had jurisdiction to decide.

The plaintiff has no right to litigate the same question twice. *Baldwin v. Traveling Men's Assn.*—283 U. S. 522. "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues". *American Surety Company v. Baldwin, et al.*—287 U. S. 156 at p. 166. In *Stoll v. Gottlieb*—305 U. S. 165 at p. 172, the Supreme Court said—

- 89        "After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made, has not the power to inquire again into that jurisdictional fact."

See also *United States v. Moser*—266 U. S. 236; *Chicot County District v. Bank*—308 U. S. 371; *Glackin v. Zeller*—52 Barbour's Reports (N. Y.) 147.

- 90        While a dismissal of an action on the sole ground that the court has no jurisdiction of the subject matter or of the parties is a conclusive determination of the fact that the court lacks jurisdiction, it is not an adjudication of the merits and will not bar another action in the proper tribunal for the same cause; nor will it bar a second suit where the pleader in the prior suit failed to allege some essential jurisdictional fact which later is supplied in a new pleading. It is quite true that if a suit be dismissed solely for lack of jurisdiction because there is no diversity of citizenship between plaintiff and defendant, that plaintiff may bring suit on the same cause of action in the same district if he subsequently becomes a citizen of another state so that diversity of citizenship then exists between plaintiff and defendant; and the dismissal of the first suit is not a bar to the second in the same court.

But in such subsequent suit a different state of facts is presented which alters the situation and calls for a new determination by the court. cf. *Gilmer v. City of Grand Rapids*—16 Fed. 708.

In the light of the decision of the Supreme Court in *Neirbo v. Bethlehem Shipbuilding Corp.* (*supra*), it may be unfortunate for the plaintiff that he did not take an appeal from the first judgment, but not having done so he is now precluded from raising all objections which were then available to him. *Chicot v. Bank*, *supra*.

To support his contention the plaintiff relies upon *Smith v. McNeal*—109 U. S. 426 and *Bunker Hill & Sullivan Mining & Co. Co. v. Shoshone Mining Co.*—109 Fed. 504. In *Smith v. McNeal*, the complaint was dismissed for lack of jurisdiction because of the plaintiff's failure to allege an essential jurisdictional fact. In a later suit this omission was corrected and the court in the second suit held that this omission having been supplied, a judgment in the prior suit was not a bar to the second suit. The *Bunker Hill & Sullivan Mining Co. Co.* case seems to go no further than to say that a dismissal for want of jurisdiction is not a judgment on the merits and does not prevent the plaintiff from subsequently prosecuting his action in a court authorized to entertain it.

The motion of the First Boston Corporation and A. C. Allyn & Co. Inc. to set aside the attempted service of the summons and complaint upon them and to dismiss the complaint as to them should be granted.

(II) Defendant, Schroder-Rockefeller & Co. Inc. moves to dismiss on the ground that the complaint fails to state a cause of action against it upon which relief can be granted. In the alternative—to require plaintiff to furnish a more definite statement of the causes of action al-

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leged against it, or to furnish a bill of particulars supplying certain information so that it may properly prepare its answer. Schroder-Rockefeller & Co. Inc. is sought to be held liable only for the facts alleged in the Fourth cause of action of the complaint and the sufficiency of a similar Fourth cause of action has been upheld by Judge Patterson and Judge Leibell in opinions dated June 22, 1938 and July 26, 1938 respectively. See *Ripperger v. Allyn*—25 Fed. Supp. 554. However, the facts are not the same; there is this difference in the situation with respect to Schroder-Rockefeller & Co. Inc. and the defendants who tested the complaint before Judge Patterson and before Judge Leibell. The last wrongful act for which the moving defendants are sought to be held liable is alleged to have occurred on May 21, 1936 and Schroder-Rockefeller & Co. Inc. was not incorporated and did not come into existence until July 7, 1936. I think, therefore, that as to this defendant the complaint as it stands fails to clearly state a claim against defendant, Schroder-Rockefeller & Co. Inc. on which relief may be awarded, and the motion to dismiss should be granted with leave to plaintiff to amend.

96 The motions of defendants, A. C. Allyn & Co. Inc. and of First Boston Corporation, to dismiss the complaint as to each of them is granted.

The motion of defendant, Schroder-Rockefeller & Co. Inc. to dismiss the complaint is granted with leave to plaintiff to amend his complaint.

Settle orders on notice.

May 1, 1940.

HENRY W. GODDARD,  
U. S. D. J.

**Stipulation as to Record.**

97

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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IT IS HEREBY STIPULATED AND AGREED by and between the undersigned parties to this appeal that the foregoing Record shall constitute the record on appeal herein pursuant to Rule 76 of the Rules of Civil Procedure.

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Dated: June 5, 1940.

JACOB K. JAVITS, and  
PERCIVAL E. JACKSON,  
Attorneys for Henry J. Ripperger, as Receiver of  
United States Electric Power Corporation,  
Appellant.

CLAIRE W. HARDY,  
Attorney for A. C. Allyn & Co., Inc.,  
Appellee.

SULLIVAN & CROMWELL,  
Attorneys for First Boston Corporation,  
Appellee.

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**Approval of Record by District Court.**

The foregoing statement and record pursuant to Rule 76 of the Rules of Civil Procedure are hereby approved.

Dated: June 5, 1940.

HENRY W. GODDARD,  
District Judge.

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**Certification of Record.**

UNITED STATES OF AMERICA }  
 SOUTHERN DISTRICT OF NEW YORK } ss.:

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[SAME TITLE]

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101

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

IN TESTIMONY WHEREOF I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this ~~5th~~ <sup>JUNE</sup> day of ~~MAY~~, in the year of our Lord, one thousand nine hundred and forty and of the Independence of the said United States the one hundred and sixty-fourth.

GEORGE J. H. FOLLMER,  
*Clerk.*

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[SEAL]

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1939

No. 406

(Argued June 19, 1940. Decided July 15, 1940)

HENRY J. RIPPERGER, as Receiver of United States Electric  
Power Corporation, Plaintiff-Appellant,

vs.

A. C. ALLYN & Co., INC., and FIRST BOSTON CORPORATION,  
Defendants-Appellees; Schroder-Rockefeller & Co., Inc.,  
Defendant

Appeal from the District Court of the United States for  
the Southern District of New York

The plaintiff appeals from two orders dismissing his complaint as against A. C. Allyn & Co., Inc. and First Boston Corporation, respectively. Affirmed.

Before Swan, Clark and Patterson, Circuit Judges

[fol. 36] Jacob K. Javits and Percival E. Jackson, Solicitors for Appellant.

Claire W. Hardy, Solicitor for A. C. Allyn & Co., Inc., Appellee.

Sullivan & Cromwell, Solicitors for First Boston Corporation, Appellee.

SWAN, Circuit Judge:

This appeal is submitted upon an agreed statement pursuant to Rule 76, F. R. C. P. The question presented is whether the court erred in holding that orders of dismissal for lack of jurisdiction on the ground of improper venue entered in a prior suit on the same cause of action and in the same court require dismissal of the present suit as against the appellees on the principle of *res judicata*.

The facts are briefly as follows: In 1938 the plaintiff, as receiver of United States Electric Power Corporation, incorporated in Maryland, brought suit in the district court for the southern district of New York against the directors of said corporation and others, charging a conspiracy to use

the corporate assets for their private profit. Among the defendants named in that suit were A. C. Allyn & Co., Inc., a Delaware corporation, and First Boston Corporation, a Massachusetts corporation. As neither of the corporations nor the plaintiff was a citizen or resident of New York, they respectively moved to vacate service of summons and to dismiss the complaint as to them for lack of jurisdiction on the ground of improper venue. These motions were granted. The plaintiff took no appeal from the orders of dismissal. Thereafter he instituted similar suits based upon the same transactions against First Boston Corporation [fol. 37] and A. C. Allyn & Co., Inc., in the federal district courts of Massachusetts and Delaware, respectively. These cases are at issue and awaiting trial. After the decision of the Supreme Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, the plaintiff brought the present suit against the appellees and another corporation, *Schroder-Rockefeller & Co., Inc.*, which had not previously been sued. The complaint in the present suit alleges that each of the appellees had designated an agent for service of process within the state of New York. In all other respects the complaint is similar to the complaint in the plaintiff's former suit in the court below and sets forth the same transactions. On motions of the appellees the complaint was dismissed as to them on the ground that the orders of dismissal in the former suit are *res judicata* on the question of the district court's lack of jurisdiction for want of venue in the present suit. By this appeal the plaintiff seeks to reverse that holding and, if he succeeds, he intends to apply for an order consolidating for trial the present action with his former action, which is still pending against other parties and is expected to come to trial next September.

The appellant concedes, as he necessarily must on the authorities, that a decision in favor of jurisdiction is *res judicata* and invulnerable to collateral attack, even though the ground on which the decision was rested has subsequently been overruled. See *United States v. Moser*, 266 U. S. 236, 242; *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522, 524; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166; *Chicot County District v. Baxter State Bank*, 308 U. S. 371, 376; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. —; *Sorenson v. Sutherland*, 109 F. 2d 714, 718 (C. C. A. 2), cert. granted sub nom. *Jackson v.*



Irving Trust Co., 310 U. S. —. But he advances the contention that a decision that jurisdiction is lacking leaves the parties as though no action had ever been brought and [fol. 38] therefore presents no bar to a subsequent action even in the same court. We think the argument ingenious but unsound. A court has power to determine whether or not it has jurisdiction of the subject matter of a suit and of the parties thereto. As Mr. Justice Brandeis remarked in *American Surety Company v. Baldwin*, *supra*, "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." No reason is apparent why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it. The case of *Rand v. United States*, 48 F. 357, at 358 (D. C. Me.) affirmed in 53 F. 348 (C. C. A. 1) without discussion of the point, appears to support the appellant's position, but we respectfully disagree with it. Compare *Armour & Co. v. Kloebe*, 109 F. 2d 72 (C. C. A. 6), cert.-granted 310 U. S.

The other cases relied upon by the appellant are readily distinguishable. It will suffice to refer to *Smith v. McNeal*, 109 U. S. 426. There the first suit was dismissed because the complaint did not allege the requisite jurisdictional facts, and the dismissal was held to be no bar to a second suit in the same court in which the complaint did state them. But in the case at bar both complaints are alike except for the non-jurisdictional allegation in the second complaint that the appellees had respectively appointed an agent for service of process within the state of New York. Such appointment antedated the first suit. Improper venue is a waivable defense, and no allegation as to venue is required in the complaint. Note 3 to Official Form 2, following Federal Rules of Civil Procedure; 1 Moore's Fed. Prac. 470. Whether the designation of a statutory agent for service of process constituted a consent to be sued in the district court for the southern district of New York was a question necessarily involved in the controversy presented by the motions to dismiss the first complaint as against the [fol. 39] present appellees, and the fact of such designation could have been shown by affidavit, as it was in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, *supra*. There has been no change in the facts upon which the venue privilege depends. The orders of dismissal in the former suit necessarily determined that the defense of improper venue had

not been waived. No appeal having been taken, the former decision stands as a conclusive determination of that issue between the parties.

Orders affirmed.

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[fol. 40] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND  
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of August one thousand nine hundred and forty.

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark, Hon. Robert P. Patterson, Circuit Judges.

HENRY J. RIPPERGER, as Receiver of United States Electric Power Corp., Plaintiff-Appellant,

vs.

A. C. ALLYN & Co., INC., and FIRST BOSTON CORP., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 41] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Henry J. Ripperger, as Receiver, etc., vs. A. C. Allyn & Co., Inc., and First Boston Corporation. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 1, 1940. D. E. Roberts, Clerk.

[fol. 42] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF  
NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 41, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry J. Ripperger, as Receiver of United States Electric Power Corp., Plaintiff-Appellant, against A. C. Allyn & Co., Inc., and First Boston Corp., Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of September, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. Roberts, Clerk. (Seal.)